In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 220

BENJAMIN H. FULLER and JOHN J. BERNICH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray for a writ of certiorari to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit entered on June 11, 1940, affirming the judgment of conviction against petitioners by the United States District Court in and

for the Southern Division of the Northern District of California.

The petitioners were indicted on thirteen counts. The first twelve counts charged petitioners with knowingly and willfully falsifying, concealing and covering up by a trick, scheme and device, to-wit: by false affidavits, and using and causing to be used said false affidavits, for the purpose of *selling* gold to the United States Mint at San Francisco, California, all in violation of Title 18 U. S. C. A., Sec. 80 thereof, and also in count thirteen with a conspiracy by means of said false affidavits to *sell* gold and defraud the United States in violation of Title 18, U. S. C. A., Sec. 88 thereof. (Indictment, Tr. 1-43.)

They were tried and convicted (Tr. 110, 542), except as to count one of the indictment, as to which the trial Court directed the jury to find a verdict of not guilty. (Tr. 490-491, 541.) This left twelve counts for the consideration of the jury. Counts two and three charge petitioner Fuller with the substantive offenses of making *but two* false affidavits in *selling* gold to the United States Mint at San Francisco and copies of these two alleged false affidavits are appended to the indictment and made a part thereof, count two being Exhibit "B" (Tr. 28-31) and count three being Exhibit "C". (Tr. 31-34.)

Counts four, five and six charge petitioner Bernich with the substantive offenses of making *but three* affidavits in *selling* gold to the United States Mint at San Francisco and copies of these three alleged false affidavits are appended to the indictment and made a part

thereof, count four being Exhibit "D" (Tr. 34-37), count five being Exhibit "E" (Tr. 37-40) and count six being Exhibit "F". (Tr. 40, 43.)

Counts seven, eight and nine charge petitioner Fuller with using and causing to be used the said false affidavits above referred to in *selling* gold to the United States Mint. (Indictment, Tr. 15-18.)

Counts ten, eleven and twelve charge petitioner Bernich with using and causing to be used the false affidavits above referred to in counts four, five, and six in *selling* gold to the United States Mint. (Indictment, Tr. 18-21.)

Count thirteen charged a *general conspiracy* to *sell* gold to the United States Mint against all the defendants, six in number. (Tr. 21-22.)

Petitioners were each sentenced to a period of five years on the eleven counts of the indictment in violation of Title 18 U. S. C. A., Sec. 80, all of said sentences to run concurrently, and to two years on the conspiracy charge in violation of Title 18 U. S. C. A., Sec. 88, that sentence also to run concurrently with the other sentences. (Tr. 548-549.)

It should be explained that all of the other four defendants who were acquitted, as well as the two petitioners, are miners and engaged in the mining and milling of ores and converting the same into gold bullion in Amador County within the *Northern* Division of the Northern District of California.

The "Gold Reserve Act of 1934" and the regulations promulgated by the Secretary of the Treasury there-

under require that any *sale* of gold bullion to the United States Mint shall be accompanied by an affidavit. (See Sec. 38 of Provisional Regulations issued under the Gold Reserve Act of 1934; see appendix to this petition.) The affidavits five in number—set out in the various counts of the indictment were on Form "TG-19" and had to accompany the *sale* of gold to the Mint "by persons who have *mined or panned* it."

The petitioners prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of conviction. (See opinion of Appellate Court in appendix to this petition.)

The petitioners presented to the trial Court a demurrer to the indictment which was overruled, exception taken and the ruling of the trial Court affirmed on the appeal.

They likewise presented motions for a directed verdict, which were likewise denied by the trial Court, exception taken and the ruling of the trial Court affirmed on appeal.

They also presented a plea in abatement and motion for change of venue supported by affidavits as to the first twelve counts of the indictment (not including the count thirteen as to conspiracy), which plea and motion were likewise denied, exception taken and the ruling of the trial Court affirmed on appeal.

They also made a timely motion for a bill of particulars, which was also denied by the trial Court and likewise affirmed on appeal.

Various serious and flagrant errors were committed by the trial Court in its rulings admitting and reject-

ing evidence, to all of which exceptions were taken, but the rulings of the trial Court were affirmed on appeal.

Misconduct of the prosecuting attorney in his remarks to the jury, which were deeply prejudicial to the petitioners, was also assigned as error, but the rulings of the trial Court in this respect were affirmed on appeal.

These petitioners presented no evidence in their behalf but relied entirely upon the insufficiency of the case presented by the prosecution. Of the six defendants indicted, the trial Court was compelled to instruct the jury to acquit as to two because of the weakness of the evidence introduced by the prosecution; two of the other defendants were acquitted by the jury; thus leaving the two petitioners who now petition for a writ of certiorari.

Although the record is somewhat voluminous (see Transcript of Record, Vols. I and II), the trial consuming some three weeks and involving the testimony of some thirty witnesses introduced by the prosecution, the opinion of the Circuit Court of Appeals is exceedingly brief and either ignores or fails to comment on the several important constitutional and jurisdictional questions pressed to its attention, both on the arguments in chief and on petition for rehearing, and now presented to this Honorable Court for its serious consideration.

In support of this petition for writ of certiorari, the following important questions are presented for the consideration of this Honorable Court.

I.

GOLD RESERVE ACT OF 1934 DOES NOT PROHIBIT "A SALE". IT SIMPLY PROHIBITS "ACQUIRING".

The demurrer interposed to the indictment should have been sustained on some one, or all, of the grounds urged and presented. (Tr. 54-63; 147.)

> *"Where the charge is of crime, it must have clear legislative basis."*
>
> *United States v. George,* 228 U. S. 14, *22.*

A reading of Secs. 3 and 4 of the Gold Reserve Act will disclose that it is *not* an offense to *sell gold* to the United States Mint, or, in fact, to anyone. What is inhibited is:

> "Any gold *withheld, acquired, transported, melted or treated, imported, exported or earmarked, or held in custody,* in violation of this act or *of any regulation issued hereunder, or licenses issued pursuant thereto."* (See Appendix to this petition, pp. vi-vii.)

In other words, *"acquiring"* of gold contrary to the Act is prohibited but the *"sale"* of gold *is not prohibited.* A mere reading of the Gold Reserve Act will establish that. Therefore, this entire prosecution, which is based on the *sale of gold* to the United States Mint, falls to the ground and the petitioners stand convicted of offenses which are not such in fact.

The situation is comparable to that which existed under the National Prohibition Act. Under that Act, the *purchaser* was not criminally liable but the *seller*

was. Under the Gold Reserve Act the *seller* is *not liable* but the *purchaser,* the person *acquiring—buying* —the gold is criminally liable.

> "The purchaser of liquor is not criminally liable, as the National Prohibition Law is against the sale of liquor and not the purchase. Likewise, a person who assists a purchaser is not liable."
>
> *McFadden on Prohibition,* Sec. 267, p. 294;
> *Harkins v. Provenzo,* 189 N. Y. S. 258;
> *Lindsay v. State* (Ark.), 219 S. W. 1025;
> *Cortinas v. State* (Texas), 245 S. W. 911;
> *Harris v. State* (Ark.), 215 S. W. 620.
>
> "Seeking now to apply the rule to this case, it is notable that the substantive offense is selling; *buying is not a crime.* That there cannot be a seller without a correlative buyer is true, but not to the point. Congress has taken half a transaction and labeled that as crime; *the other half is not condemned."*
>
> *Vannata v. United States,* 289 Fed. 424, *428.*

Nor could a conspiracy be alleged between buyer and seller. As was well said by Mr. Justice Stone in *United States v. Katz,* 271 ~~Fed~~ U.S. 354, 70 L. Ed. 986, *988:*

> "This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare United

States v. New York C. & H. R. R. Co. (C. C.), 146 Fed. 298; United States v. Dietrich (C. C.), 126 Fed. 664; Vannata v. United States (C. C. A. 2d), 289 Fed. 424, 427."

The same would be true of the "Gold Reserve Act of 1934". A conspiracy between the buyer to "acquire" gold and the seller to "sell" gold could not be charged as a crime, "as the agreement of the parties was an essential element in the sale."

The demurrer to the indictment generally and specifically urged that not any of the counts of the indictment set forth facts sufficient to constitute any offense against the laws of the United States. (Demurrer, Tr. pp. 54-62; 147.)

The regulations prescribed by the Secretary of the Treasury under the Gold Reserve Act, to-wit: "Article VI. Purchase of gold by Mints", apply to "purchase" not *"sale"* and any regulation prescribed by the Secretary of the Treasury requiring an affidavit on form TG-19 to accompany *"the sale"* of gold to the United States Mint is not justified by any law of Congress and has no *"clear legislative basis"*. The petitioners had a perfect legal right *to sell* gold to the Mint or to anyone else.

See, also,

United States v. Eaton, 144 U. S. 677, 688, 36 L. Ed. 591, *594;*

United States v. George, 228 U. S. 14.

II.

GOLD RESERVE ACT OF 1934 IS UNCONSTITUTIONAL, AND THE RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE TREASURY UNDER SUB. (c) OF SEC. 3 OF THE ACT ARE VOID.

(a) The Gold Reserve Act of 1934 is unconstitutional. It is contrary to Sub. 5 of Sec. 8 of Article I of the Constitution of the United States which provides:

> "The Congress shall have power * * * to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." (Tr. 54-76; *60-61-62;* 147.)

This is a country of delegated powers. The States reserved all powers to themselves excepting those expressly or impliedly delegated to the Federal Government. There is nothing in the Constitution authorizing the Federal Government to buy all of the gold produced within the several States; in fact, giving the Federal Government a monopoly on all the gold produced within the several States and, in effect, violative of the anti-trust laws.

But certainly it is a denial of due process of law, when the Congress or the Secretary of the Treasury attempts to enact regulations making it a violation of law for a citizen of California to own a gold nugget, or to acquire a gold nugget, or to transport a gold nugget, or to sell a gold nugget, or to hoard a gold nugget, any more than a gold chain or a gold watch.

(b) The rules and regulations of the Secretary of the Treasury are unconstitutional and void.

Section 3 of the Gold Reserve Act of 1934 provides:

> "Sec. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balance; and, (c) *for such other purposes as in his judgment are not inconsistent with the purposes of this Act.*" (See Appendix, p. vi.)

We are concerned with the regulations of the Secretary of the Treasury under the head of "(c)". These regulations consist of numerous provisions, entitled "Article VI. Purchase of Gold by Mints", especially from Sections 35 to 42 of the regulations. (See provisional Regulations issued under the Gold Reserve Act of 1934.)

But Congress, under Sub. (c) does not state for what purpose, or in fact, any purpose, the Secretary of the Treasury is to issue any regulations under the head of (c). It affords no standard or basis for any regulations to be issued by him. It simply leaves the entire matter to his own unbounded, unlimited and unfettered judgment without any legislative instructions or standards set up by Congress. It must be manifest that there is no congressional basis for any of the regulations issued by the Secretary of the Treasury upon which to base the forfeiture of the

gold in question. Congress simply abdicated its legislative function to the Secretary of the Treasury.

No sufficient, or any, standard is set up by Congress to effect a lawful delegation of its legislative powers to an executive officer by Sec. 3, Sub. (c) of Sec. 442 of the Gold Reserve Act of 1934.

It is, of course, a fundamental constitutional principle that the legislature cannot delegate legislative power to an executive official or department.

In its aforementioned recent applications of said basic legal principle, the Supreme Court has very definitely condemned various attempts by Congress to vest in the executive branches of our government, unfettered discretion to make and adopt policies which are essentially legislative and not administrative.

The following are but a few of the many decisions of the United States Supreme Court on this subject:

Schechter Poultry Corp. v. U. S. (1934), 295 U. S. 495, 79 L. ed. 1570;

Panama Refining Company v. Ryan (1934), 293 U. S. 388, 79 L. ed. 446;

Carter v. Carter Coal Co. (1935), 298 U. S. 238, 80 L. ed. 1160;

Wayman v. Southard (1825), 10 Wheat. 1, 6 L. ed. 253.

See, also:

St. Louis Terminal R. Co. v. U. S. (1911—C. C. A. 8), 188 Fed. 191;

U. S. v. Mathews (1906—D. C.), 146 Fed. 306.

But, more on this subject will be presented in the brief supporting this petition.

The Circuit Court of Appeals held that the Gold Reserve Act of 1934 *"does not purport to provide punishment as and for a criminal offense."* (110 F. (2d) 815, *817.*) If the *sale* of gold is not prohibited, then every count of the indictment falls for each count thereof is predicated upon the *sale* of gold to the United States Mint. (Tr. 143.)

The conclusion is inescapable that there is no legal justification for the offenses charged and that the conviction of the petitioners is null and void and should be set aside.

III.

"GOLD RESERVE ACT OF 1934" IS A SPECIAL STATUTE ON THE SUBJECT OF GOLD, GOLD BULLION, ETC. AND SUPERSEDES AND IS AN EXCEPTION TO THE FALSE CLAIMS ACT AS CONTAINED IN SEC. 80 OF TITLE 18 U. S. C. A.

Petitioners' demurrer should have been sustained on that ground alone. (Tr. 54-62, *59, 60, 61;* 147.)

It was contended, both in the trial Court and before the Circuit Court of Appeals, that the false claims act, Sec. 80, Title 18 U. S. C. A., was inapplicable to the offenses charged; that it had, in effect, been superseded by the "Gold Reserve Act of 1934", which was a special statute, alone applicable to the offenses charged;

and for the further reason that the later provisions of the "Gold Reserve Act of 1934" are inconsistent with and repugnant to the penal provisions of Sec. 80, Title 18 U. S. C. A.

A reading of the complete text of the "Gold Reserve Act of 1934" with the "Provisional Regulations issued under the Gold Reserve Act of 1934", will show how completely and exclusively the "Gold Reserve Act of 1934" and its regulations cover and legislate as to gold, gold bullion etc. and how its milder punishment for violations of the act and the regulations, of forfeiture of the gold and a penalty in twice the value of the gold, are entirely inconsistent and repugnant to the drastic punishment of ten years imprisonment and/or a fine not to exceed $10,000 imposed by the false claims act, Section 80, Title 18 U. S. C. A., under which latter statute the petitioners were prosecuted and convicted. (See 48 Stats. 337-344.)

The Circuit Court of Appeals, however, held to the contrary, stating:

> "It is urged that the Gold Reserve Act provides an exclusive penalty for the violation of its terms, thus superseding the false claims statute. By Section 4 of the act provision is made for the forfeiture of gold held in violation of the law, and for a 'penalty equal to twice the value of the gold.' *The section does not purport to provide punishment as for a criminal offense.* In any event it is immaterial whether it does or not, for the section obviously deals with an offense entirely distinct from that punishable under the false claims statute." (Italics ours.)

We contend, as we contended in the Court below, that the "Gold Reserve Act of 1934" supersedes and is an exception to the false claims act and the Congress clearly indicated that the milder punishment imposed by the "Gold Reserve Act of 1934" should be exclusive and not resort had to the drastic punishment imposed by the false claims act.

IV.

PROSECUTION EVEN UNDER FALSE CLAIMS ACT CANNOT BE SUSTAINED.

The indictment under the false claims act both for the substantive offenses and the conspiracy charges a false affidavit. (See 80, Title 18 U.S.C.A. and see 88, Title 18 U.S.C.A.) This affidavit is provided for by Sub. 3 of Sec. 442 of the Gold Reserve Act. As the Circuit Court of Appeals said in its opinion:

> "Paragraph 38 of the regulations requires that 'an affidavit in form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning * * *' *The regulation does not particularize the information to be included in the affidavit.*" (See opinion in Appendix, p. iii.)

If the regulation does not provide for the particular information, how can any crime or offense be based thereon?

> *"Where the charge is of crime, it must have clear legislative basis."*
>
> *U. S. v. George,* 228 U. S. 14.

The "trick, scheme and device" set forth in every count of the indictment, in *selling* gold to the United States Mint, is a "false affidavit" on "form TG-19". The affidavit on "form TG-19" is prescribed by the regulations of the Secretary of the Treasury under the "Gold Reserve Act of 1934". None of the matters set out in each count of the indictment are required to be set out in an affidavit on "form TG-19". In other words, an affidavit on "form TG-19" is not required, by the regulations, to set out

> "together with a statement also under oath giving (a) the names of the persons from whom gold was purchased; (b) amount and description of each lot of gold purchased; (c) the location of the mine or placer deposit from which each lot was taken; and (d) the period within which such gold was taken from the mine or placer deposit, shall be filed with each such delivery of gold by persons who have purchased such gold directly from the persons who have mined or panned such gold." (See Appendix, p. v.)

The particulars above set forth are required by regulation to be set forth on "form TG-21". But the indictment in the case at bar deals *only with an affidavit on "form TG-19"*. All that this affidavit on "form TG-19" requires, so far as the regulations provide is that *"If delivered to the mint by persons who have mined or panned it, an affidavit on Form 'TG-19' is to be filed"*.

But no regulation of the Secretary of the Treasury provides for the particulars which must be set out on "form TG-19", in order to constitute falsity or per-

jury. *There is absolutely no "clear" or, in fact, any "legislative basis" for the crime charged in the indictment.*

It is conceded by the Circuit Court of Appeals, in its opinion, that "the regulation does not particularize the information to be included in the affidavit." (See opinion in Appendix, p. iii.)

But, before an act can become a crime in this country, it *"must have clear legislative basis"*. The offenses charged in each count of the indictment in the case at bar have *no "clear legislative basis"*, and, having none, the entire prosecution must fail and the conviction of petitioners is rendered null and void.

It is indeed anomalous that one can be convicted for a felony when the special statute governing the entire subject, according to the decision of the Appellate Court, provides no criminal punishment at all. (See opinion in Appendix, pp. i-iv.)

Again, the indictment charges that the allegedly false affidavits were used "to defraud the United States". (Tr. 22.) The evidence discloses that the United States was not defrauded of a single cent. The United States Mint bought the gold and placed its own valuation on it. It is one thing to defraud the United States out of money or something of value. It is quite another thing to interfere with the functions of the government by means of false affidavits. The indictment does not charge that any function of the government was interfered with by the use of the five false affidavits set out in the indictment and the pleader is concluded by his own allegation. (Tr. 1-43.)

Crime in this country cannot be supported on a "fiction of law". We submit that where it is no offense to *sell* gold to the United States Mint, any regulation of the Secretary of the Treasury prescribing an affidavit with reference thereto *making it an offense is null and void* and, if that be so, that any prosecution under the false claims act based on any alleged false affidavit is equally without legal foundation and void.

The Circuit Court of Appeals holds in effect that the Gold Reserve Act does not create any offenses or crimes and yet it holds that under the false claims act the petitioners can be prosecuted for acts which are not in themselves criminal and for a conspiracy of acts which are not in themselves criminal, *and for which there is no clear legislative basis.*

V.

OFFENSES CHARGED IN FIRST SIX COUNTS OF INDICTMENT WERE COMMITTED AND SHOULD HAVE BEEN TRIED WITHIN NORTHERN DIVISION OF NORTHERN DISTRICT OF CALIFORNIA.

How the Circuit Court of Appeals could uphold the ruling of the lower Court in deciding that the lower Court had jurisdiction of the charges contained in the first six counts of the indictment when the affidavits attached to the first six counts of the indictment, to-wit: Exhibits "A", "B", "C", "D", "E", "F", showed that the affidavits were all signed, sworn to

and executed in Jackson, Amador County, within the *Northern* Division of the Northern District of California and therefore constitutionally and properly triable at Sacramento within the *Northern* Division of the Northern District of California and not at San Francisco within the *Southern* Division of the Northern District of California is, frankly, incomprehensible to us. We made timely motions supported by sworn affidavits both by way of plea in abatement and motion for change of venue to change the place of trial as to those counts. (Tr. 25-43; 45-50; 50-53.)

The reason given by the Appellate Court that "however, the offenses had their culmination in the Southern Division, hence were triable there", is certainly no answer to the plea in abatement and motion for change of venue as to the first six counts of the indictment, for, confessedly, they were *all sworn to in Jackson, Amador County,* which is within the *Northern* Division of the Northern District of California and hence triable at Sacramento, California. (See opinion in Appendix, p. iii.)

Certainly, as to the first six counts of the indictment, the petitioners were entitled, as a matter of constitutional right, to be tried in the *Northern* Division of the Northern District of California and not in the *Southern* Division and, *on this ground alone,* this petition for certiorari should be granted. Neither the action of the trial Court nor of the Circuit Court of Appeals, in denying the plea in abatement and motion for change of venue, can be justified on any ground whatsoever.

VI.

BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED.

The only reason given for the affirmance of these motions by the Appellate Court is: "The offenses charged are described with great particularity in the indictment." (See opinion in Appendix, p. iii.)

It must be evident that the 200 or more affidavits of a total stranger to the case—one George F. Fuller, —which were subsequently produced at the trial and of which the petitioners had no notice, were *not described with any particularity in the indictment or, indeed, at all.*

The petitioners were called to the bar of justice to answer *six affidavits.* (Tr. 1-43.) They were not called upon to meet some 200 or more affidavits of an utter stranger to the case, by whose affidavits they were not bound and could not be held responsible, and who was never proven to be a co-conspirator with the petitioners or anyone else.

Under all the elementary rules of criminal law which protect a person accused of crime, the bill of particulars should have been granted, especially under the decision of the Circuit Court of Appeals for the Ninth Circuit, rendered in the case of *Schreve v. United States,* 77 F. (2d) 2, *9.*

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, *593.*

The motion for a bill of particulars should have been granted by the trial Court. Some 200 or more

affidavits were introduced in evidence as to which the petitioners were not advised and were taken by gross surprise and against which they were wholly defenseless. Most of these affidavits related to one not a defendant in the case and by which the petitioners could not be bound. The promise of the prosecution to connect this stranger to the case as a fellow conspirator or "unknown defendant" was never kept. There was no evidence of the slightest tinge of conspiracy between this "unknown defendant", and the petitioners or either of them as to whom some 200 affidavits were introduced against the petitioners, to their great prejudice and harm before the jury. The jury was led to believe that the petitioners were responsible for or had something to do with these 200 or more affidavits of an utter stranger to the case.

VII.

ADMISSION OF 200 OR MORE AFFIDAVITS ABOVE REFERRED TO GROSS, INEXCUSABLE AND PREJUDICIAL ERROR.

We submit that respondent's attempt to excuse the denial of the motion for a bill of particulars or the admission in evidence of the 200 or more affidavits of George Franklin Fuller, Sr.,—a total stranger to the case—is insufficient and does not answer the vice of the admission of this large highly prejudicial batch of affidavits in the case.

Most of these outside or extraneous affidavits were massed in "U. S. Exhibit 8". (Tr. 248; 252; 253-4;

271-272; 273-274-275; 276-277; 278-279; 487-488.) These affidavits related for the most part—some 200 in number—to the mining operations of George Franklin Fuller, Sr., a total stranger to the case—during 1936 and 1937; some forty additional affidavits were introduced against petitioner Bernich and some twenty additional affidavits against petitioner Fuller. *The falsity of not a single one of these affidavits was established by direct or circumstantial evidence.* Their introduction in evidence could have no other result than to confuse and confound the jury. The obvious purpose of the prosecution in introducing this evidence was, of course, that of attempting to still further prejudice the defense in the eyes of the jury by showing that the petitioners had made very substantial sums out of this gold business, the implication being that these were illicit gains. This "evidence" was one of the aforementioned flimsy bits of evidence by which the prosecution attempted to build up the "atmosphere", and create the impression in the minds of the jury, that it was dealing with "big shot" gold racketeers.

Furthermore, what materiality or relevancy the admission of 30 or more affidavits by petitioner Bernich as to his operations in the Fern Mine could have on the falsity of the three affidavits in the indictment is difficult to imagine, which three affidavits were confined to the Fuller Mine.

VIII.

MISCONDUCT OF ASSISTANT PROSECUTING ATTORNEY SHOULD RESULT IN A NEW TRIAL.

The counsel for the government, in his brief before the Circuit Court of Appeals, made no attempt whatever to uphold or defend against the inexcusable remarks made that *"it would be cumbersome to file an indictment containing 200 such affidavits"*, referring to affidavits of a total stranger to the case, George Franklin Fuller, Sr. The only justification given at the trial was that "it also goes to show the conspiracy and means of completing the conspiracy." (Tr. 246-247-248; 271-272; 276-277; 166-176.)

But the prosecution presented no evidence whatsoever of any conspiracy between the petitioners and George Franklin Fuller, Sr., or any other "unknown individual", although it promised repeatedly to do so. (Tr. 179-180-181-182.)

These inexcusable and indefensible remarks, that *"it would be cumbersome to file an indictment containing 200 such affidavits"*, could have had no other effect than to lead the jury to believe that the prosecution could have presented an indictment containing 200 or more additional charges against the petitioners,—most damaging, prejudicial and incurable misconduct.

Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314, *1319-1322*.

IX.

EVIDENCE TOTALLY INSUFFICIENT TO JUSTIFY CONVICTION ON EITHER SUBSTANTIVE OFFENSES OR CONSPIRACY CHARGE.

The motions for an instructed verdict should have been granted by the trial Court and the Appellate Court should have reversed the judgment of conviction for the refusal of the trial Court to grant the motions for an instructed verdict. (Tr. 488-516; 516-518; 147-149.)

There was not the slightest direct testimony as to the falsity of any of the five affidavits charged in the indictment, assuming, which we deny, that the regulations providing for such affidavits are constitutional and valid. There was nothing in the case on the part of the prosecution but surmise, conjecture, opinion, probabilities, inference on an inference and presumption on presumption, evidence entirely insufficient in a criminal case to uphold a conviction.

United States v. Ross, 92 U. S. 281, 23 L. Ed. 707, *708;*

Gerson v. United States, 25 F. (2d) 49, *60;*

People v. Van Zile, 143 N. Y. 372, 38 N. E. 381;

Body v. Glucklich, 116 Fed. 131, 53 (C. C. A.) 451.

Even if the inferences or presumptions could be dignified as circumstantial evidence, the conviction could not be sustained, for it is well settled that, where the testimony and evidence, based on circumstantial

evidence, is just as consistent with the innocence of the petitioners as with their guilt, the duty of the trial Court is to instruct the jury to acquit.

Hayes v. United States, 169 Fed. 101, *103;*
Mickel v. United States, 157 Fed. 229;
Van Gorder v. United States, 21 F. (2d) 939, *942;*
Turinetti v. United States, 2 F. (2d) 15, *17.*

In upholding the ruling of the trial Court and of the Circuit Court of Appeals in denying the motions for a directed verdict, the Circuit Court of Appeals stated: "*Appellants did not take the stand* and no evidence was introduced in their defense." (See opinion in Appendix, p. iv.)

We respectfully submit that the Circuit Court of Appeals was doing violence to one of the most elementary principles of criminal law and that is, that one accused of crime does not have to take the stand and no inference or presumption of guilt can be indulged against him on that account. A defendant is presumed to be innocent and proof of his guilt must be established beyond all reasonable doubt. The burden of proof is on the prosecution and *not* on the defendant.

Articles V and VI of Amendments to Constitution;
Act of Congress of March 15, 1878 (20 Stat. at L. 30, Chap. 37);
Boyd v. United States, 116 U. S. 616;
Coffin v. United States, 156 U. S. 432, *455,* 39 L. Ed. 481, *491.*

As was well said by Mr. Justice White in the great case of *Coffin v. United States,* 156 U. S. 432, *455,* 39 L. Ed. 481, *491:*

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and *its enforcement lies at the foundation of the administration of our criminal law.* * * *"

We respectfully submit that the Circuit Court of Appeals had no more right to indulge in "any presumption against him (defendant)" from his failure to take the stand (Act March 16, 1878, c. 37, 20 Stat. 30), than had the jury or trial Court, under this mandatory statute and the law of the land.

We sincerely believe that we come within some of the requirements of Sub. 5 of Rule 38 of the Rules of the Supreme Court of the United States, which indicate when petitions for writs of certiorari will be granted. For instance, we believe we come within (b) of Sub. 5 of Rule 38, which states:

> "(b) Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions; *or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings,*

or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Italics ours.)

The constitutionality of the "Gold Reserve Act of 1934" has not been passed upon by this Honorable Court; the validity of the regulations under that Act as contained in Sub. (c) of Section 3 of the "Gold Reserve Act of 1934" and whether they constitute unlawful delegation of legislative power to an executive has never been passed upon by this Honorable Court; whether the "Gold Reserve Act of 1934" is a special statute on the subject of gold, gold bullion etc. and supersedes or constitutes an exception to the false claims act, Title 18 U. S. C. A., Sec. 80, has never been passed upon by this Honorable Court; in other respects, we submit that the rulings of the trial Court resulting in the conviction of the petitioners were so erroneous as to deprive them of a fair and impartial trial and the refusal of the Circuit Court of Appeals for the Ninth Circuit to reverse their conviction constitutes, we respectfully submit, a travesty on justice.

Wherefore, because of the gravity and importance of the questions involved your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them, and each of them, to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the records and proceedings with the original exhibits of the said Circuit Court of Appeals in the case

lately pending therein, entitled Benjamin H. Fuller and John J. Bernich, Appellants, vs. United States of America, Appellee, No. 9221, to the end that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit may be reviewed as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the decision and judgment of said Circuit Court of Appeals for the Ninth Circuit and of the United States District Court in and for the Southern Division of the Northern District of California in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners now present, as an exhibit to this petition, a certified copy of the entire transcript of record before the Circuit Court of Appeals for the Ninth Circuit, with the original exhibits therein, to which Court they pray the writ of certiorari may be directed.

Dated, San Francisco, California,
June 28, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioners in the above-entitled cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition for a writ of certiorari is not interposed for delay.

Dated, San Francisco, California,
June 28, 1940.

MARSHALL B. WOODWORTH,
Attorney for Petitioners.